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No. 10-349

IN THE

Supreme Court of the United States

SHELL OIL COMPANY, and SWEPI LP
(As Successor-in-Interest to SHELL
WESTERN E & P, INC.),
Petitioners,

v.

NANCY FULLER HEBBLE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the State of Oklahoma

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers.

[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party has authored this brief in whole or in part, and no person or entity other than *amicus*, its members and their counsel has made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), all parties received timely notice and have consented to the filing of this brief.

These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 900 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

PLAC is particularly interested in the issues raised by this case, because product manufacturers are disproportionately affected by punitive damages awards. The due process protections afforded by the United States Constitution are essential to ensure that punitive damages awards are rendered in a manner that is scrupulously fair to the defendant. State and federal courts have interpreted the punitive damages guideposts set out by this Court in a wildly inconsistent fashion. Whether this is the result of confusion or a willful attempt to circumvent the Court's dictates, product manufacturers and others are routinely subject to arbitrary and grossly excessive punitive damages awards. PLAC believes its viewpoint will assist in the Court in achieving a better understanding of the nature of the problem and the reasons why it is critical for the Court to provide additional clarification regarding the relationship among the guideposts and the proper appli-

cation of the ratios between compensatory and punitive damages.

SUMMARY OF ARGUMENT

In the more than seven years since this Court decided *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the punitive damages guideposts and the ratios between compensatory and punitive damages set out by the Court have proven to be of little use in ensuring a system of justice in which defendants can be reasonably apprised of the penalties they may face. The relationship among the guideposts is unclear, allowing courts to use the reprehensibility guidepost to trump the others. Courts are also confused about application of the ratios, and have defaulted to the position that a 9:1 or lower ratio will always pass muster, despite this Court's holding that in cases with substantial compensatory damages, a ratio of 1:1, and in almost all other cases, a ratio of 4:1, approaches the outer limits of due process.

Since *State Farm*, courts have applied ratios from 1:1 to 2172:1, and all levels in between. In some courts, the perceived reprehensibility of the conduct is used to justify extremely high ratios. In others, the "potential harm"—often loosely defined—is substituted for the jury's actual damages award, so as to transform a very large ratio into a much smaller one. Courts routinely exceed a 1:1 ratio between compensatory and punitive damages, although the compensatory award is unquestionably substantial. Even more troubling is the fact that courts in different Circuits have interpreted *State Farm* in different ways. In short, the outer limits of due process differ greatly depending on the fortuity of where and in what court a case happens to be decided. This is

inconsistent with our constitutional guarantees, which should be applied similarly regardless of what court is meting out justice.

Even when ratios are applied in a manner generally consistent with *State Farm*'s ruling, courts have applied different approaches to determining the components of "compensatory" damages. In this case, the court included pre-judgment interest at a punitive rate, while other courts have included various other components, including attorneys' fees and lost profits. A ratio whose numerator and denominator cannot be readily and consistently determined is of little use to courts attempting to ensure that punitive damage awards comport with due process, or to defendants assessing potential liability should they go to trial. The problem of inconsistent application of the *State Farm* ratios, while significant in itself, is magnified when the ratio itself is malleable depending on what a court includes as compensatory.

These problems are perhaps more keenly felt by product manufacturers than by other litigants, because of the fact that product liability cases more often involve physical injuries or deaths. Aside from the obvious emotional component of these cases, which can result in higher jury verdicts, they often lead to punitive damages awards. The inability of manufacturers and sellers to assess their level of risk results in forced settlements, higher prices, less innovation and a marketplace where some products are simply not economical to design and sell because of the risk of unfettered and unpredictable liability.

The Court should grant *certiorari* in this case to clarify the application of the ratios set forth in *State Farm* and the relationship among the guideposts, and to make clear that compensatory damages do not

include pre-judgment interest and other "add-ons", so that due process guarantees are applied similarly regardless of the court or jurisdiction in which a defendant may find itself.

ARGUMENT

Despite this Court's efforts to lend consistency to the process by which punitive damages are awarded and reviewed, defendants in state and federal courts continue to experience wide variations in how the guideposts and ratios are applied. The "stark unpredictability"[2] of punitive awards violates due process because defendants are deprived of "fair notice . . . of the severity of the penalty that a State may impose." *BMW N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). The decision of the Oklahoma Court of Civil Appeals is only one of many state and federal cases in which the guideposts have been twisted beyond recognition. Review is necessary in order to clarify the relationship among the guideposts and the proper application of the ratios between compensatory and punitive damages.

I. IN THE WAKE OF *STATE FARM*, PUNITIVE DAMAGES AWARDS CONTINUE TO BE UNPREDICTABLE AND ARBITRARY IN VIOLATION OF DUE PROCESS

In *State Farm*, this Court elaborated on the guideposts set forth in *Gore* in an effort to prevent arbitrary and constitutionally excessive punitive damages awards. While declining to provide "rigid benchmarks", 538 U.S. at 425, the Court made clear that all three guideposts should be considered, and gave guidance as to the ratios to be used in evaluat-

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[2] *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008).

ing punitive damages awards. Specifically, the Court explained that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* The Court further held that, "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* The $1 million awarded to the plaintiffs in *State Farm* was recognized to be "substantial", and, accordingly, the Court held that it "likely would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429.

Despite the *Gore* and *State Farm* framework, courts continue to reach results that are flatly inconsistent with it and wildly divergent. Ratios from 1:1 all the way to 2174:1 have been approved as purportedly consistent with due process constraints. *See, e.g., Williams v. Conagra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004) (1:1 ratio applied in Title VII employment discrimination case); *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354 (11th Cir. 2004) (2174:1 ratio in RICO case involving gambling charges included in long distance bills). Despite *State Farm*'s direction that "few awards exceeding a single-digit ratio . . . will satisfy due process," 538 U.S. at 425, numerous courts have found reasons to exceed single digits, often by a large margin. *See, e.g., Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003) (37:1 ratio in bedbug infestation case); *Krysa v. Payne*, 176 S.W.3d 150 (Mo. App. 2005) (27:1 ratio in fraud case involving vehicle sale); *Bronakowski v. Lindhurst*, __S.W.3d__, 2009 Ark. App. 513 (2009)

(42:1 ratio in case involving trees cleared from plaintiffs' property without permission resulting in economic harm of $592.85).

Courts seem most inclined to permit hugely lopsided ratios when the amount of compensatory damages is small, using as justification such factors as perceived reprehensibility or potential damages. Indeed, although it is to some extent a subjective indicator, a high degree of reprehensibility is routinely cited in support of grossly excessive punitive damages awards. In such cases, the reprehensibility guidepost effectively becomes the *only* guidepost. Other courts have applied ratios exceeding 1:1 even where compensatory damages are unquestionably substantial. *See, e.g., Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004) (in case involving denial of disability benefits where compensatory damages were over $1.9 million, court approved punitive damages of $5 million, a ratio of 2.6:1); *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521 (Tenn. 2008) (ratio of 5.35:1 approved in automobile defect case involving death of child where compensatory damages were $2.5 million).

If this Court had "concerns over the imprecise manner in which punitive damages systems are administered"[3] when *State Farm* was decided in 2003, the way in which its holdings have been applied by lower courts since that time should give rise to nothing short of extreme consternation, if not outright alarm.

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[3] *State Farm*, 538 U.S. at 417.

A. In Small Compensatory Damages Cases, Reprehensibility is Used as the Rationale for Grossly Excessive Punitive Damages

Many of the highest ratios are applied in cases where compensatory damages are small. Courts in this situation seem to struggle with how to justify large punitive damages awards, often citing the reprehensibility of the conduct. This scenario was contemplated in *State Farm*, 538 U.S. at 425 ("ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages'") (quoting *Gore*, 517 U.S. at 582). But permitting unfettered discretion in such circumstances to use any ratio imaginable belies the notion that there are *any* "outermost limits" to the due process guarantee. Moreover, permitting the reprehensibility guidepost to trump the ratio guidepost means that, for many courts, the analysis is over once reprehensibility is determined. In this way, a subjective determination of reprehensibility is used to obliterate due process guarantees.

A case in point is *Trinity Evangelical Lutheran Church and School-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789 (Wis. 2003). The *Trinity* case arose out of an insurance policy that erroneously omitted certain coverage due to the agent's mistake in writing the application. The error was discovered after an accident resulted in litigation against the insured church, but the insurer declined to reform the policy. The trial judge granted summary judgment to the policyholder on the bad faith claim, awarding $17,500 in compensatory damages, and a jury returned a punitive damages award of $3.5 million—

a ratio of more than 200:1. Notwithstanding this ratio, the court affirmed the award, citing the insurance company's reprehensible conduct, including its status as a "recidivist" because it was the defendant in a case *more than 30 years earlier* in which the court held that an insurer has a duty to reform an insurance policy upon discovery of a mutual mistake. *Id.* at 801. The court never even mentioned the 200:1 ratio between actual and punitive damages, but, instead, recast the ratio as 7:1 on the basis of plaintiff's evidence that its potential exposure in the underlying litigation was $490,000. *Id.* at 803[4]

As a dissenting judge noted, the comparison between the facts of *Trinity* and the *State Farm* case is striking, yet in *State Farm*, this Court compared the actual compensatory damages in the bad faith claim (not the potential verdict in the underlying action) with the punitive damages award and found the ratio of 145:1 unconstitutional. *Id.* at 811 (Sykes, J., dissenting). The judge continued, "The majority's position [using the $490,000 potential award as the denominator] . . . amounts to nothing more than a manipulation of the ratio for purposes of due process scrutiny." *Id.* The dissent also exposed the absurdity of the majority's reprehensibility analysis, noting that: this was a case that arose from a mistake; it involved economic injury only; Trinity was never at risk in the underlying action; no one's health or safety was at risk; there was no financial vulnerability; and the 30-

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[4] A dissenting judge made clear that Trinity would never have been exposed to liability in the auto accident case, because even if Tower did not provide coverage under its policy, the insurance agent's errors and omission policy would provide coverage. *Id.* at 810-11 (Sykes, J., dissenting).

year old contract case in no way supported a "recidivist" label. *Id.* at 810.

Similarly, Shell's conduct in this case resulted in only economic injuries, posed no risk to anyone's health or safety, did not involve repeated similar instances, and was not directed at a financially vulnerable plaintiff. Yet the court found Shell's conduct to be so reprehensible as to support a ratio as high as 87:1, depending on how "compensatory" damages are counted.[5] Thus, even though the Court has laid out the elements of reprehensibility with relative clarity, the interpretation is subjective and leads to dissimilar outcomes for similar conduct. *Compare Krysa v. Payne*, 176 S.W.3d 150 (Mo. App. 2005) (27:1 ratio in case involving fraud and breach of warranty where vehicle was sold without disclosure that it was actually two damaged vehicles welded together) *with Austin v. Stokes-Craven Holding Corp.*, 691 S.E.2d 135 (S.C. 2010) (8:1 ratio in fraud case involving sale of automobile without disclosure of prior accident).

Other courts have allowed perceived reprehensibility to run roughshod over the other guideposts. *See, e.g., Kemp*, 393 F.3d at 1363 (affirming 2174:1 ratio in case where defendant's inclusion of charges for telephone gambling game in long-distance charges was characterized as "large-scale corporate malfeasance"). In cases where there is a confluence of bad conduct, an unsympathetic (or simply large corporate) defendant and an innocent victim, disproportionate punitive damages awards are allowed to stand

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[5] When the same case can be characterized as involving multiple ratios depending on what is counted as "compensatory", it is apparent that the *State Farm* ratios are toothless as a means to combat grossly excessive punitive damages awards.

because "a particularly egregious act has resulted in only a small amount of economic damages." *Gore*, 517 U.S. at 582. As one of the dissenters in *Trinity* observed, "The plaintiff was a church, the defendant was an insurance company, and the judge was making official pronouncements about the defendant's bad faith. Is there any wonder that the jury awarded $3,500,000 in punitive damages?" 661 N.W.2d. at 806 (Prosser, J., dissenting). *See also Mathias*, 347 F.3d at 677 ($5000 compensatory damages and $186,000 in punitive damages, a 37:1 ratio, affirmed in bedbug case where the defendant's conduct was judged "outrageous"); *Superior Fed. Bank v. Jones & Mackey Const. Co., LLC*, 219 S.W.3d 643 (Ark. Ct. App. 2005) (17.6 to 1 ratio is not constitutionally excessive or "breathtaking" due to substantial degree of reprehensibility).[6]

As the Texas Supreme Court stated in reversing an award of $1.25 million in punitive damages in a case involving actual damages of $5327.11 as a result of the conversion of 13 head of cattle:

> If courts fail to diligently police the "particularly egregious" exception, they insulate from due-process review precisely those cases where judicial review matters most: those involving unsympathetic defendants where juries are most likely to grant arbitrary and excessive awards. *Allowing a freewheeling reprehensibility exception would subvert the constraining power of the ratio guidepost.*

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[6] The court stated, "Our research indicates that this factor [the ratio] seems to engender great confusion and controversy in comparison with the other factors. We believe this is due in no small part to the U.S. Supreme Court's rather conflicting statements on the matter." *Superior Fed.*, 219 S.W.3d at 651.

Bennett v. Reynolds, 315 S.W.3d 867, 879 (Tex. 2010) (emphasis added; footnote omitted). Yet this is exactly what is happening in courts across the country.

B. The Use of Potential Harm in Place of Actual Damages Encourages Speculation and Subverts the Role of the Jury

Courts have also permitted ratios greatly in excess of 4:1, or even single digits, in cases where the potential harm, rather than actual harm, is judged to be the appropriate denominator. In *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), a plurality of the Court said, "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460. The plurality affirmed a $10 million punitive damages award with a ratio of 526:1, citing potential harm and reprehensibility of the conduct. Writing separately, Justice O'Connor took issue with the plurality's approach, stating, "I believe it likely, if not inescapable, that the jury was influenced unduly by TXO's out-of-state status and its large resources." *Id.* at 495.[7]

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[7] Justice O'Connor was also critical of the state appellate court's application of "cavalier standards in the course of a cursory examination of the case." *Id.* at 496. The same could be said of the Oklahoma Court of Civil Appeals in this case, whose two-paragraph treatment of the punitive damages award is unquestionably "cursory" and arguably "cavalier".

The outcome in *TXO* would seem to be in question in light of the Court's more recent punitive damages jurisprudence. But the use of often speculative assessments of "potential harm" in order to justify ratios that are in evident conflict with the guideposts continues to be a problem. For example, in *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940 (Or. Ct. App. 2007), which involved a predatory lending claim, the appellate court reinstated the jury's original $500,000 punitive damages award, recharacterizing what had been a 7.5:1 ratio as a 1.53:1 ratio. In lieu of the actual compensatory award of just under $32,000, the appellate court estimated the potential harm of the defendant's conduct as the interest that would have been paid over the life of the loan, which came to over $326,000. *Id.* at 958; *see also Trinity*, 661 N.W.2d at 803 (200:1 ratio converted to 7:1 by insertion of $490,000 in potential harm in place of actual $17,500 compensatory award).

Not only are assessments of potential harm often speculative, but use of potential harm, rather than actual damages, subverts the role of the jury. "The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values." *TXO*, 509 U.S. at 473 (O'Connor, J.). The willingness of some courts to ignore the compensatory damages *as found by the jury* constitutes patent manipulation in order to justify the punitive damages award. *See Trinity*, 661 N.W.2d at 811 (Sykes, J., dissenting). Ironically, the inviolability of the jury's determination of the appropriate amount of punitive damages necessary to punish and achieve retribution is cited by the very courts that so eagerly push aside the jury's compensatory damages decision. While there may be a rare case in which consideration of

potential harm is justified, in most cases deference should be given to the jury's decision on compensatory damages.[8]

C. Courts Improperly Exceed the 1:1 Ratio Even When Compensatory Damages Are Substantial

Many state and federal courts have departed considerably from a 1:1 ratio even in cases where compensatory damages are substantial. Perhaps the most egregious example is the decision of the Utah Supreme Court on remand in *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004), where the court reduced the punitive damages award to a ratio of 9:1, despite the fact that the compensatory award of over $1 million was unquestionably substantial.[9] Notwithstanding this Court's instruction that, in such cases, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *State Farm*, 538 U.S. at 425, the Utah court considered the 9:1 ratio justified in light of State Farm's highly reprehensible conduct.

Similar results have obtained in other cases. *See, e.g., Seltzer v. Morton*, 154 P.3d 561 (Mont. 2007) (9:1 ratio affirmed in case involving $1.4 million in compensatory damages for malicious prosecution and abuse of process arising out of art authenticator's opinion); *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001 (8th Cir. 2008) (8.36:1

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[8] The exception would be a case such as this one where the jury was directed to include pre-judgment interest in its "compensatory" award.

[9] The definition of "substantial" is, of course, subject to interpretation, lending additional uncertainty to the proper application of the ratio.

ratio in commercial fraud case with $125,000 in compensatory damages); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003) (7.2:1 ratio applied in employment discrimination and retaliatory discharge case in which $360,000 in compensatory damages were awarded); *Flax*, 272 S.W.3d 521 (5.35:1 ratio in automobile products liability case where jury awarded $2.5 million for death of child).

What these courts have in common is a willingness to read *State Farm* to permit a high single-digit ratio, regardless of whether the compensatory damages are "substantial" or even whether the conduct at issue is objectively reprehensible. *See, e.g., Gober v. Ralphs Grocery Co.*, 137 Cal.App.4th 204, 222-23 (2006) (6:1 ratio approved despite "modest degree of reprehensibility" and substantial compensatory damages). In the process, courts disregard completely this Court's ruling in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), that a four-to-one ratio "may be close to the line" of constitutional impropriety. *See also Gore*, 517 U.S. at 581; *State Farm*, 538 U.S. at 425.

While the Court in *State Farm* evidently wanted to leave room for a very small number of cases in which individual factors might make a larger ratio permissible, appellate courts around the country have driven a proverbial truck through this opening. If the Constitution requires a 1:1 ratio in almost all cases with substantial compensatory damage awards, it is apparent that courts across the country either do not understand this or are acting in disregard of constitutional requirements. In either event, it is apparent that this Court needs to clarify the relationship among the three *Gore* guideposts, so that subjective assessments of reprehensibility are not permitted to trump the ratio guidepost entirely, and to

elucidate the proper application of the ratios set out in *State Farm*.[10]

D. Geographic and Jurisdictional Variability in Application of the Ratio Guidepost Adversely Affects the Quality of Justice

The problem of inconsistency in use of the ratio guidepost is worse in some courts and jurisdictions than others. A similar case involving similar parties in two different parts of the country can result in starkly different punitive damages awards depending on the approach of the reviewing courts. While some appellate courts have taken to heart the *State Farm* ratio of 1:1 in cases involving substantial compensatory damages, others view 4:1 as a starting point, and some courts take the *laissez-faire* view that as long as the ratio is in single digits, due process is assured.

For example, in *Bains LLC v. Arco Products Co.*, 405 F.3d 764 (9th Cir. 2005), the Ninth Circuit mentioned the putative 1:1 ratio established by *State Farm* only in passing, despite finding that the compensatory damages of $50,000 were substantial. *Bains* involved claims for breach of contract and violation of § 1981 brought by a trucking company that alleged it suffered economic damages as a result of discrimination. Explaining that this was not the

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[10] In a recent study of punitive damages awards exceeding $100 million, the authors concluded that, "If strictly applied, limiting the ratio of punitive damages to compensatory damages to 1:1 would eliminate about two-thirds of the cases from the $100 million blockbuster category." Alison F. Del Rossi and W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 Am. L. & Econ. Rev. 116, 155 (2010).

rare case that would justify punitive damages in excess of a single-digit ratio, the court ruled that the "controlling Supreme court authority . . . implies a punitive damages ceiling in this case of, at most, $450,000 (nine times the compensatory damages)." *Id.* at 776.

Other Ninth Circuit cases similarly take 4:1 or higher as the appropriate starting point in the analysis. In *Zhang,* another § 1981 race discrimination case, the court affirmed a 7:1 ratio, saying, "We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case." 339 F.3d at 1044. *See also Hangarter,* 373 F.3d at 1014 (rejecting defendant's argument that punitive damages should not exceed a 1:1 ratio because *State Farm*'s ruling is "not binding, no matter how factually similar the cases may be").

Some state appellate courts have similarly explored only the upper boundaries of the *State Farm* ratios while ignoring the lower ones. In *Seltzer*, the Montana Supreme Court rejected the notion that "a 9:1 ratio is in almost all cases the constitutional limit." 154 P.3d at 611. Citing *Hangarter*, the court said, "[T]he Ninth Circuit Court of Appeals has recognized that *Campbell*'s reference to a 1:1 ratio does not establish a categorical rule in favor of a 1:1 ratio where compensatory damages are substantial." *Id.* at 612. The Montana court held that a ratio of 18:1 complies with *State Farm*'s ruling because it does not exceed single digits "to a significant degree." *Id.*; *see also Gober*, 137 Cal.App.4th at 222 (affirming 6:1 ratio in case involving substantial compensatory damages and "a modest degree of reprehensibility").

In *Flax*, the Supreme Court of Tennessee, in a case involving an alleged design defect in a seat back, found that an award of $2.5 million is not "so large as to require a ratio of 1:1." 272 S.W.3d at 539. Nor did the *Flax* court think that it needed to adhere to a ratio of 4:1. *Id.* at 540. *Flax* is also notable because the court expressed confusion about the relationship among the three guideposts. Noting that the third guidepost "seems to compel a dramatically different conclusion" than the other two—*i.e.*, a much lower punitive damages award—the court confessed it was "unfortunately left with little guidance as to how to resolve this discrepancy because both *Gore* and *Campbell* are cases in which all of the guideposts suggest the same result." *Id.* Accordingly, it simply ignored the discrepant third guidepost and approved a 5:35.1 ratio.

The picture that emerges is one of confusion, both for the courts who have to apply the guideposts and for litigants who need to understand their potential liability if punitive damages are imposed. Faced with uncertainty, it appears many courts have concluded that the constitutionally "safe" course is to approve punitive damages awards with a 9:1 or lower ratio, regardless of the degree of reprehensibility or whether the compensatory damages are substantial. If this Court takes only the most outrageous or shocking cases, it leaves the lower courts free to run roughshod over the Court's dictates that 1:1, or at most 4:1, is at the outer limits of due process requirements. The Court should grant review in order to put teeth into the ruling that a 1:1 ratio is the outer limit of due process in a case with substantial compensatory damages, that all the guideposts must align for a punitive damages award in excess of

1:1, and that it is the exceedingly rare case that would justify a ratio in excess of 4:1.

II. THE PROBLEM OF UNPREDICTABLE APPLICATION OF THE GUIDEPOSTS IS COMPOUNDED BY INCONSISTENT DEFINITIONS OF "COMPENSATORY" DAMAGES

Due process limitations are required to lend predictability to the amount of punitive damages that may be awarded in a given case. Facing litigation, a defendant can arguably apply the reprehensibility factors to its own conduct to assess the likelihood that reprehensibility will be found and to what extent. Similarly, potential compensatory damages can be estimated. If a consistent, or, at least, predictable, ratio were applied between punitive and actual damages, the defendant would have a reasonably good sense of the outer limits of its exposure in any given case. However, there is no consistency or predictability to the ratios, which is problem enough. When combined with fluid concepts of what can be included in the definition of "compensatory" damages, the problem is magnified to the point of unconstitutionality.

A ratio is only useful if the defendant can predict the likely numerator and denominator. Not only is such predictability sorely lacking at the beginning of a case, but the fact that, after the jury's verdict, the same set of facts can be manipulated to support a variety of different ratios reveals that the guidelines are, indeed, illusory and insubstantial. Here, the inclusion of pre-judgment interest as part of the compensatory award inflated the actual damages of $750,000 to a whopping $13.2 million after application of the 12% interest rate evidently intended by

the legislature as penal. This resulted in what would have been a ratio of 86:1 being reduced to only 4:1, a result the Oklahoma court found in its cursory fashion to pass constitutional muster. In doing so, the court did not even give lip service to any reason for its departure from the 1:1 *State Farm* ratio for cases involving substantial compensatory damages.

The inclusion of pre-judgment interest is only one example of the types of "add-ons" used by some courts to deflate the ratio from one that seems excessive to one that is at least facially constitutional. These range from attorneys' fees to statutory penalties to cases in which emotional distress is a component of the compensatory award. *See, e.g., Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3d Cir. 2005) (attorneys' fees); *Modern Management Co. v. Wilson*, 997 A.2d 37 (D.C. 2010) (statutory treble damages); *Roby v. McKesson Corp.*, 101 Cal. Rptr. 3d 773 (Cal. Ct. App. 2010) (emotional distress partially punitive). As in this case, other courts have included as "compensatory" elements of damages that far exceed the actual harm caused to the plaintiff, resulting in unconstitutional punitive damages awards. This Court should grant *certiorari* to rectify the injustice done to Petitioners and to provide clear guidance to other courts regarding the proper components of "compensatory" damages for purposes of the due process ratios.

III. PRODUCT MANUFACTURERS ARE ADVERSELY AFFECTED BY UNPREDICTABLE AND ARBITRARY PUNITIVE DAMAGES AWARDS

Product manufacturers are among the defendants who are often adversely affected by unpredictable and grossly excessive punitive damages awards. It is

not difficult to see why, as the elements of reprehensibility—"the most important indicium of the reasonableness of a punitive damages award"[11]—are present in many product liability cases. These cases often involve physical, as opposed to economic harm. Design defect cases always involve intentional decisions regarding costs and benefits of the product's design, and manufacturers are thus more likely to be considered to be in reckless disregard of health or safety. *See, e.g.*, David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 24-26 (1982) ("[A] manufacturer's choices involving necessary safety trade-offs and statistically inevitable risks always can be viewed in a sense as intentional wrongs to consumers hurt by such products. . . ."). The defendant is often a large corporation (likely from another state) while the plaintiff is an injured individual (sometimes a child or elderly person), who is by definition more vulnerable, both financially and otherwise. The design decisions at issue affect millions of identical products, so juries are often aware of other similar incidents and injuries, making the conduct seem even more reprehensible. *Id.* at 28-30. And juries are subject to hindsight bias, which comes into play in cases involving cost-benefit analysis with disturbing frequency. *See, e.g.*, W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 563 (2000) ("Instead of comparing expected benefits and costs, jurors may compare the enormous cost to the victim with the relatively negligible cost of the safety improvement.")

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[11] *Gore*, 517 U.S. at 575.

Since, in practice, the reprehensibility guidepost trumps the ratio guidepost, product manufacturers are likely to be inordinately affected by grossly excessive punitive damages awards. In a recent study of so-called "blockbuster" punitive damages awards (those of $100 million or more) issued since 1985, the authors concluded that a disproportionate number of such awards involved the automobile, cigarette, pharmaceutical/health care and energy/chemical industries. Alison F. Del Rossi and W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 Am. L. & Econ. Rev. 116, 126 & Table 2 (2010). The mean ratio of punitive to compensatory damages ranged from 19:1 for the automobile industry to 11,125:1 for the cigarette industry. *Id.*[12]

The effect of such disproportionality directed at product manufacturers strikes at the heart of our economy. The threat of unlimited liability results in higher prices for consumer goods, less innovation and self-imposed restrictions on the products that are developed and brought to market. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/AIMD-95, MEDICAL LIABILITY: IMPACT ON HOSPITAL AND PHYSICIAN COSTS EXTENDS BEYOND INSURANCE 16 (1995) ("Manufacturers pass on their liability costs to hospitals and physicians in their products' prices."); Richard L. Manning, *Changing Rules in Tort Law and the Market for Childhood Vaccines*, 37 J.L. & Econ. 247, 273 (1994) ("liability costs have caused dramatic increases in vaccine prices").

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[12] The latter ratio is even more alarming than it appears, because a Florida jury's $145 billion punitive damages award in a tobacco class action was excluded. *Id.*

In addition, the inability to predict and manage liability risks has a tendency to force settlements because proceeding to trial is simply too dangerous. Much has been written about the decline of the jury trial, particularly in federal courts. *See, e.g.*, Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255 (2005); Hon. Sam Sparks and George Butts, *Disappearing Juries and Jury Verdicts*, 39 Tex. Tech L. Rev. 289 (2007). Certainly, one factor that has influenced this trend is the threat of large punitive damages awards. *See, e.g.*, Royal Furgeson, *Civil Jury Trials R.I.P.? Can it Actually Happen in America?*, 40 St. Mary's L.J. 795, at 861 (2009) ("One of the major criticisms of juries is the unpredictability of their decisions on punitive damages.") If defendants are unwilling to try cases because of the risk of runaway punitive damages awards, jury trials will continue to die a slow death, and our system of justice will be further eroded.

CONCLUSION

As in *Gore*, "a review of this case would help to illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages." 517 U.S. at 568 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994)). The Court should grant the petition for a writ of *certiorari* in order to clarify the limits on punitive damages awards imposed by due process, to establish the proper relationship among the *Gore* guideposts, and to end continuing uncertainty about the proper components of "compensatory" damages.

Respectfully submitted,

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APPENDIX

APPENDIX A

Corporate Members of the
Product Liability Advisory Council, Inc
as of 11/9/2010

Total: 100

3M

Altec Industries

Altria Client Services Inc.

Anheuser-Busch Companies

Arai Helmet, Ltd.

Astec Industries

Bayer Corporation

Beretta U.S.A Corp.

BIC Corporation

Biro Manufacturing Company, Inc.

BMW of North America, LLC

Boeing Company

Bombardier Recreational Products

BP America Inc.

Bridgestone Americas Holding, Inc.

Brown-Forman Corporation

Caterpillar Inc.

Chrysler Group LLC

Continental Tire the Americas LLC

Cooper Tire and Rubber Company

Crown Equipment Corporation

Daimler Trucks North America LLC

The Dow Chemical Company

E.I. duPont de Nemours and Company

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Environmental Solutions Group

Estee Lauder Companies

Exxon Mobil Corporation

Ford Motor Company

General Electric Company

General Motors Corporation

GlaxoSmithKline

The Goodyear Tire & Rubber Company

Great Dane Limited Partnership

Harley-Davidson Motor Company

Hawker Beechcraft Corporation

Honda North America, Inc.

Hyundai Motor America

Illinois Tool Works, Inc.

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Jaguar Land Rover North America, LLC

Jarden Corporation

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc., Joy Mining Machinery

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Leviton Manufacturing Co., Inc

Lincoln Electric Company

Magna International Inc.

Marucci Sports, L.L.C.

Mazak Corporation

Mazda (North America), Inc.

Medtronic, Inc.

Merck & Co., Inc.

Michelin North America, Inc.

Microsoft Corporation

Mitsubishi Motors North America, Inc.

Mueller Water Product

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

PACCAR Inc.

Panasonic

Pella Corporation

Pfizer Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Remington Arms Company, Inc.

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Segway Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Synthes (U.S.A.)

Techtronic Industries North America, Inc.

Terex Corporation

TK Holdings Inc.

The Toro Company

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

Zimmer, Inc.